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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

EDWARD H. SAUNDERS,
Counsel for Petitioner.

JOHN FOSHEE,
LITA SPROGINS MOORE,
Of Counsel.

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LONNIE AVERY,

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vs.

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Lonnie Avery respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Your petitioner was indicted for the offense of murder in the first degree by a grand jury of Bibb County, Alabama, at the second term of the Circuit Court of said County for the year 1934 (R. 1). Petitioner was arrested for the offense charged in the said indictment in Pittsburgh, Pennsylvania, and brought back to Bibb County, Alabama, about one week before his arraignment which occurred on March

21, 1938, soon after noon of that day (R. 16, 35, 1). Mr. Fred Wood and Mr. John Foshee were appointed by the trial court, Judge John Miller, to defend the petitioner at the time of his arraignment; and his trial was set at that time for Wednesday, March 23, 1938 (R. 1). At the time of petitioner's arraignment and the appointment of said attorneys to defend him the trial court did not ask the petitioner if he was able to employ counsel to represent him, or if he had friends or relatives who would be interested in assisting him to employ counsel to represent him (R. 33). The defendant, your petitioner, is a negro. He is ignorant and illiterate and probably insane. His mind appears to a layman as being feeble. He is unable to read or write (R. 31, 33). The attorneys appointed to defend him were unable to get any material information out of him. He could tell them little about the facts (R. 31). The scene of the alleged offense was several miles from the county seat and the courthouse (R. 31). His attorneys were unable to leave the court during the period of time from their appointment to the date of his trial due to the fact that it was the regular criminal court week and they were employed in other cases which were set for trial on Monday, Tuesday and Wednesday of that week which were subject to call at any time during those days (R. 5, 6, 32-33).

The petitioner's case was not tried on March 23, 1938, due to other cases that were in the process of trial. He was put to trial on Thursday, March 24, 1938 (R. 33). When his case was called for trial the attorneys appointed to defend him filed a written motion praying for a continuance of his case upon the grounds that they had not had a reasonable time to prepare the case for trial; that they had other cases in court which prevented them from leaving court to investigate the case; that to require the defendant to go to trial on that date would deny to the defendant the right to be represented by attorney, and other grounds

of the same nature (R. 4). This motion was supported by evidence in the form of affidavits executed by each of said attorneys (R. 5, 6), but it was denied and overruled by the trial court and petitioner was placed on trial on Thursday, March 24, 1938 (R. 7).

The petitioner was the sole witness called in his behalf during the trial of his case. The jury found the petitioner guilty of murder in the first degree and fixed his punishment at death. The judgment of the trial court followed the verdict of the jury, and sentenced petitioner to be put to death on Friday, May 13th, 1938, but the petitioner having taken an appeal to the Supreme Court of Alabama the trial court suspended the execution of his sentence to await the action of said Court on said appeal (R. 7, 8).

On March 24, 1938, attorney for petitioner filed in the Circuit Court of Bibb County, Alabama, a written motion for a new trial for petitioner, which motion was subsequently amended, and which motion as amended was based upon the grounds that the court erred in refusing to grant the motion of the defendant for a continuance; that the court abused its discretion in refusing to grant the motion of the defendant for a continuance of said cause; that defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial; that the defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial (R. 9, 10). The grounds for said motion for a new trial were

established by unimpeached evidence submitted in support thereof (R. 31-37). The said motion for a new trial as amended was denied by the trial court and the defendant duly and legally excepted to the ruling of the court on June 30, 1938 (R. 10).

The cause then proceeded by appeal to the Supreme Court of Alabama and the bill of exceptions of the defendant, your petitioner, in said appeal specifically set out the above mentioned motion for a continuance and the motion of the defendant for a new trial in said cause based upon the grounds above set out and the evidence in support thereof (R. 11-37). The Supreme Court of Alabama by a decision rendered on the 27th day of April, 1939, affirmed the action of the trial court in all things and denied that your petitioner had been denied due process of law and equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America in any substantial manner (*Avery* v. *State*, 188 So. 391; R. 39-42). Thereupon the Supreme Court of Alabama rendered a judgment and sentence in said cause in and by which June 9, 1939 was fixed as the date for the execution of your petitioner, which was stayed subsequently until June 30th, 1939 (R. 43). That decision, judgment and sentence of the Supreme Court of Alabama, upon said appeal by your petitioner, was a final judgment or decree by the highest court of the State of Alabama in which a decision could be had in said cause. Hence, this petition for a writ of certiorari to be issued out of this Honorable Court direct to the Supreme Court of Alabama requiring that court to certify and send to this Court for its review and determination a full and complete transcript of the record of all proceedings in said cause.

B.

A Statement of the Basis of the Jurisdiction of This Court to Review the Judgment or Decree in Question.

The statutory provision under which such jurisdiction is invoked is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended). Your petitioner specially set up or claimed a right, privilege, or immunity guaranteed to him under, in and by the Fourteenth Amendment to the Constitution of the United States of America in his written motion for a continuance of the cause addressed to the trial court (R. 4-5), in his written motion for a new trial, as amended, addressed to the trial court (R. 9, 10), and in and by his appeal to the Supreme Court of Alabama and his bill of exceptions in connection therewith (R. 11-37); and in each instance the same was denied to him. (See R. 7, 10, 39-42). The Federal questions of substance set up and claimed in each instance are specifically set out below. This petition has been duly made and filed in this Honorable Court within three months after the entry of final judgment or decree of the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision could be had in said cause, as provided by Section 350 of Title 28, U. S. C. A.

C.

The Question Presented.

1.

Was the petitioner denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was not given a fair, impartial and deliberate trial.

2.

Was the petitioner denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

D.

Reason Relied Upon for the Allowance of the Writ.

The Supreme Court of Alabama, the State's highest Court below, has decided a Federal question of substance in a way, probably not in accord with the applicable decisions of this Court (see *Powell* v. *State of Alabama*, 287 U. S. 45), in that its decisions in this cause in substance a denial to your petitioner of a fair, impartial and deliberate trial, and a denial to your petitioner of the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial. Only two days and one half of a day elapsed from the appointment of attorneys for your petitioner until he was put to trial. His attorneys had no opportunity to consult with probable witnesses, view the scene of the crime, secure mental specialist to examine him, secure character witnesses or any other witnesses or any other evidence that may have been available due to the fact that they were continuously detained in court because of other cases in which they were employed and set for trial on all of those days, which were subject to call at any time on each of those days. Their appointment and service was a mere empty formality. Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America as pointed out.

E.

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Alabama, requiring that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 144, Second Division, October Term, 1938-39, Lonnie Avery, Appellant, *v.* State of Alabama, and that the said judgment of the Supreme Court of Alabama be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

EDWARD H. SAUNDERS,
Counsel for Petitioner.

JOHN FOSHEE,
LITA SPROGINS MOORE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 124

LONNIE AVERY,

Petitioner,

vs.

STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the court below, written by Justice Gardner, in this cause, has not as yet been officially reported in the Alabama Reports. It may be found in the official transcript of the record on pages 39 to 41, inclusive. It was rendered on April 27, 1939, and may be found when officially reported in 188 So. 391.

The Circuit Court of Bibb County, Alabama, the trial court of this cause, rendered no opinion in connection with its decision (R. 7, 10).

II.

Jurisdiction

The statutory provision under which such jurisdiction is invoked is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended). Your petitioner specially set up or claimed a right, privilege, or immunity guaranteed to him under, in and by the Fourteenth Amendment to the Constitution of the United States of America in his written motion for a continuance of the cause addressed to the trial court (R. 4-5), in his written motion, as amended, for a new trial addressed to the trial court (R. 9, 10), and in and by his appeal to the Supreme Court of Alabama and his bill of exceptions in connection therewith (R. 11-37); and in each instance the same was denied to him. (See R. 7 and 8 showing defendant was put to trial, R. 10, and R. 39 to 42, inclusive.) The Federal questions of substance set up and claimed in each instance are specifically set out below in our Specification of Error.

This petition has been duly made and filed in this Honorable Court within three months after the entry of final judgment or decree of the Supreme Court of Alabama in this cause, the highest court of the State of Alabama in which a decision could be had in said cause, as provided by Section 350 of Title 28, U. S. C. A. The cases believed to sustain the jurisdiction are: *Powell* v. *State of Alabama*, 287 U. S. 45; *Ed Brown, et al.* v. *State of Mississippi*, 80 L. Ed. 682; and *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461.

III.

Statement of the Case.

Your petitioner was indicted for the offense of murder in the first degree by a grand jury of Bibb County, Alabama, at the second term of the Circuit Court of said County for

the year 1934 (R. 1). Petitioner was arrested for the offense charged in the said indictment in Pittsburgh, Pennsylvania, and brought back to Bibb County, Alabama, about one week before his arraignment which occurred on March 21, 1938, soon after noon of that day (R. 16, 35, 1). Mr. Fred Wood and Mr. John Foshee were appointed by the trial court, Judge John Miller, to defend the petitioner at the time of his arraignment; and his trial was set at that time for Wednesday, March 23, 1938 (R. 1). At the time of petitioner's arraignment and the appointment of said attorneys to defend him the trial court did not ask the petitioner if he was able to employ counsel to represent him, or if he had friends or relatives who would be interested in assisting him to employ counsel to represent him (R. 33). The defendant, your petitioner, is a negro. He is ignorant and illiterate and probably insane. His mind appears to a layman as being feeble. He is unable to read or write (R. 31, 32). The attorneys appointed to defend him were unable to get any material information out of him. He could tell them little about the facts (R. 31). The scene of the alleged offense was several miles from the county seat and the courthouse (R. 31). His attorneys were unable to leave the Court during the period of time from their appointment to the date of his trial due to the fact that it was the regular criminal court week and they were employed in other cases which were set for trial on Monday, Tuesday and Wednesday of that week which were subject to call at any time during those days (R. 5, 6, 32-33).

The petitioner's case was not tried on March 23, 1938, due to other cases that were in the process of trial. He was put to trial on Thursday March 24, 1938 (R. 33). When his case was called for trial the attorneys appointed to defend him filed a written motion praying for a continuance of his case upon the grounds that they had not had a reasonable time to prepare the case for trial; that they had other cases in court

which prevented them from leaving court to investigate the case; that to require the defendant to go to trial on that date would deny to the defendant the right to be represented by attorney, and other grounds of the same nature (R. 4). This motion was supported by evidence in the form of affidavits executed by each of said attorneys (R. 5, 6), but it was denied and overruled by the trial court and petitioner was placed on trial on Thursday, March 24, 1938 (R. 7).

The petitioner was the sole witness called in his behalf during the trial of his case. The jury found the petitioner guilty of murder in the first degree and fixed his punishment at death. The judgment of the trial court followed the verdict of the jury, and sentenced petitioner to be put to death on Friday, May 13th, 1938, but the petitioner having taken an appeal to the Supreme Court of Alabama the trial court suspended the execution of his sentence to await the action of said Court on said appeal (R. 7, 8).

On March 24, 1938, attorney for petitioner filed in the Circuit Court of Bibb County, Alabama, a written motion for a new trial for petitioner, which motion was subsequently amended, and which motion as amended was based upon the grounds that the court erred in refusing to grant the motion of the defendant for a continuance; that the court abused its discretion in refusing to grant the motion of the defendant for a continuance of said cause; that defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was not given a fair, impartial and deliberate trial; that the defendant was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the defendant was denied

the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial (R. 9, 10). The grounds for said motion for a new trial was established by unimpeached evidence submitted in support thereof (R. 31-37). The said motion for a new trial as amended was denied by the trial court and the defendant duly and legally excepted to the ruling of the court on June 30, 1938 (R. 10).

The cause then proceeded by appeal to the Supreme Court of Alabama and the bill of exceptions of the defendant, your petitioner, in said appeal specifically set out the above mentioned motion for a continuance and the motion of the defendant for a new trial in said cause based upon the grounds above set out and the evidence in support thereof (R. 31-37). The Supreme Court of Alabama by a decision rendered on the 27th day of April, 1939, affirmed the action of the trial court in all things and denied that your petitioner had been denied due process of law and equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America in any substantial manner (*Avery* v. *State*, 188 So. 391; R. 39-42). Thereupon the Supreme Court of Alabama rendered a judgment and sentence in said cause in and by which June 9, 1939 was fixed as the date for the execution of your petitioner, which was stayed subsequently until June 30th, 1939 (R. 43). That decision, judgment and sentence of the Supreme Court of Alabama, upon said appeal by your petitioner, was a final judgment or decree by the highest court of the State of Alabama in which a decision could be had in said cause. Hence, this petition for a writ of certiorari to be issued out of this Honorable Court direct to the Supreme Court of Alabama requiring that court to certify and send to this Court for its review and determination a full and complete transcript of the record of all proceedings in said cause.

IV.

The Specification of Errors.

1. The trial court erred in overruling the petitioner's motion for a continuance of the cause (R. 4 and see also date of judgment, R. 7), as did the court below in its approval thereof.

2. The trial court erred in overruling the motion of petitioner for a new trial (R. 10), as did the court below in its approval thereof.

3. The Supreme Court of Alabama erred in affirming the action of the trial court in all things (R. 39-42, inclusive).

4. The trial court and the Supreme Court of Alabama erred in this: Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was not given a fair, impartial and deliberate trial.

5. The trial court and the Supreme Court of Alabama erred in this: Your petitioner was denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States of America, specifically as follows: the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

V.

Argument.

The facts disclose that the attorneys appointed by the Court to defend your petitioner did not have sufficient time in which to properly and reasonably prepare the case for trial; that said attorneys made no investigation; that no witnesses were summoned for the petitioner; that petitioner

was ignorant and possibly feebleminded and unable to represent himself; that your petitioner was poor and was not asked if he could employ counsel or had friends or relatives who, if communicated with, might assist him in employing counsel to represent him; that counsel appointed were not of petitioner's own selection and that the entire trial was a mere formality. Certainly the facts disclose that the petitioner was denied due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America as pointed out. (*Ozie Powell et al.* v. *State of Alabama*, 287 U. S. 45, 84 A. L. R. 527.)

The right to counsel in this case must be conceded by the State of Alabama. (Code of Alabama 1923, Section 5567; Constitution of Alabama 1901, Section 6.) The right to counsel implies that accused shall have opportunity to select such counsel. (*Powell* v. *State of Alabama*, *supra*; *Smith* v. *United States*, Court of Appeal of District of Columbia, 288 F. 259; *Louie Yung* v. *Coleman*, Sheriff, United States District Court, 5 F. Supp. 702; *Dillingham* v. *United States*, Circuit Court of Appeals, 76 F. (2d) 36.)

In discussing the question of the right of accused to counsel in the case of *Ed Brown, Henry Shields, and Yank Ellington* v. *State of Mississippi*, 80 L. Ed. 682, this Court said:

> "The State is free to regulate the procedure of its courts in accordance with its own conception of policy, unless in so doing it, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Rogers *v.* Peck, 199 U. S. 425. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker *v.* Sanvinet, 92 U. S. 90; Hurtado *v.* California, 110 U. S. 516; Snyder *v.* Massachusetts, 291 U. S. 97. But the freedom of the state in establishing its policy is the free-

dom of Constitutional Government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and the torture chamber may not be substituted for the witness stand. The State may not deny the accused the aid of counsel. Powell *v.* Alabama, 287 U. S. 45."

Thus the aid of counsel is ranked with rights so fundamental as freedom from the rack and torture chamber and freedom from trial by ordeal.

The right to counsel would be of little worth if it did not include the right to counsel who had been given a reasonable opportunity to investigate the case and prepare for trial. It is a difficult task to defend a negro, accused of a capital offense, in Alabama. Every opportunity should be granted counsel, appointed, to defend such a case, to investigate the case, interview witnesses, view the scene of the offense, and prepare for trial. (See Annotation to *Powell* v. *State of Alabama* in 84 A. L. R. 544, showing rule that a reasonable time for the preparation of defendants case must be allowed between the time of assignment of counsel by the court and date of trial.)

In the case of *Powell* v. *State of Alabama,* above cited, this Court said, "During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *People ex rel. Burgess* v. *Risley,* 66 How. Pr. 67; *Batchelor* v. *State,* 189 Ind. 69, 76, 125 N. E. 773."

The Supreme Court of Alabama in this case said, "The difficulty under which counsel labored related to the lack

of material on which to base a defense, rather than any mere matter of time" (R. 40). The language of the case of *Powell* v. *State of Alabama, supra,* carries a different meaning in saying, "Neither they (counsel) nor the court could say what a prompt and thorough going investigation might disclose as to the facts".

The court below in its opinion in this case (R. 40) relies on the cross-examination of counsel by the trial court. In that examination the trial court resorts to the method of attempting to establish a fact by inference or insinuation in the subject matter or form of question which is dissipated by the answer to the question.

The court below questions whether the matter is properly presented for review since the record does not show a ruling by the trial court on the motion to continue the cause. The motion was presented in open court and that fact is proven by the testimony of the appointed attorneys and the defendant was put to trial. That should prove the trial court overruled the motion. But the court below has a misconception of the nature of petitioner's complaint. That complaint is not, solely, of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. We are not concerned with a mere question of state practice. The duty of maintaining constitutional rights of a person on trial for his life rise above mere rules of procedure. The conviction was void for want of due process, and the proceedings thus vitiated could be challenged in any appropriate manner. It was challenged in Supreme Court of Alabama by invocation of Fourteenth Amendment and also in the trial court by the motion for a new trial in the same manner. (*Ed Brown, et al.* v. *State of Mississippi,* 80 L. Ed. 682, *supra; Johnson* V. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461.)

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Alabama in this cause and finally reverse it.

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Of Counsel.